

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
PIRATES PLUNDER, INC.)
d.b.a. SOURDOUGH RESTAURANT,)
Appellant,)
v.)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
Respondent.)

PCHB Nos. 839 and 897

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

These matters, the consolidated appeals of two \$100 civil penalties for alleged smoke emission violations of respondent's Regulation I, came before the Pollution Control Hearings Board (Chris Smith, presiding officer, and Walt Woodward) at a formal hearing in the Seattle facility of the State Board of Industrial Insurance Appeals on September 4, 1975.

Appellant was represented by its president, Hal E. Griffith, Jr. Respondent appeared through Keith D. McGoffin. Eugene Barker, Olympia court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted.

1 Appellant made a closing argument.

2 From testimony heard, exhibits examined and argument considered,
3 and exceptions from respondent, said exceptions being granted in part
4 and denied in part, the Pollution Control Hearings Board makes these

5 FINDINGS OF FACT

6 I.

7 Respondent, pursuant to Section 5, chapter 69, Laws of 1974, 3d
8 Ex. Sess. (RCW 43.21B.260), has filed with this Board a certified copy
9 of its Regulation I containing respondent's regulations and amendments
10 thereto.

11 II.

12 Section 1.01 of respondent's Regulation I states, among other items,
13 that it is the public policy of respondent to protect human health and
14 safety; to prevent, to the greatest degree practicable, injury to plants,
15 animals and property; to foster the comfort and convenience of inhabi-
16 tants; to promote the economic and social development of the area, and to
17 facilitate enjoyment of the natural resources of the area. Section 9.03
18 makes it unlawful to cause or allow the emission for more than three
19 minutes in any one hour of an air contaminant of greater opacity than
20 40 percent prior to July 1, 1975 and 20 percent thereafter. Section 3.29
21 authorizes respondent to levy a civil penalty of not more than \$250 for
22 any violation of Regulation I.

23 III.

24 Appellant, since 1969, has operated a restaurant at Pier 57 on the
25 waterfront of Seattle, King County. The restaurant features seafood
26 cooked over alderwood in the tradition of Puget Sound Indians. The

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 restaurant has grown in popularity and now is a tourist attraction.
2 Emissions from the seafood grill and a hamburger grill are vented to
3 the atmosphere through separate stacks which emerge from the restaurant
4 roof about 35 feet above the level of Alaskan Way, the street which
5 parallels the Elliott Bay waterfront.

6 IV.

7 In November, 1974, respondent, which originally adopted Regulation I
8 in 1968, entered a new phase of enforcement of its visual emission
9 standards (Section 9.03) by applying them to restaurants. Appellant was
10 among the first to be contacted. For the next four months, respondent
11 was not successful in efforts to obtain a smoke emission compliance
12 schedule from appellant.

3 V.

14 On March 20, 1975, an inspector on respondent's staff observed
15 blue-white smoke of 60 percent opacity being emitted for at least six
16 consecutive minutes from appellant's hamburger grill stack. In connection
17 therewith, respondent served on appellant Notice of Violation No. 10651,
18 citing Section 9.03 of respondent's Regulation I, and Notice of Civil
19 Penalty No. 1990 in the sum of \$100.

20 On July 21, 1975, an inspector on respondent's staff observed blue
21 smoke varying in opacity from 25 to 80 percent being emitted from
22 appellant's seafood grill stack for eight minutes during a 40-minute
23 continuous observation period. In connection therewith, respondent served
24 on appellant Notice of Violation No. 11051, citing Section 9.03 of
25 respondent's Regulation I, and Notice of Civil Penalty No. 2314 in the
26 sum of \$100.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 The civil penalties are the subjects of the appeals.

2 VI.

3 In both instances, the smoke was dispersed quickly in the atmosphere
4 35 feet above street level and was not noticeable at street level.

5 VII.

6 Any Conclusion of Law hereinafter stated which is deemed to be a
7 Finding of Fact is adopted herewith as same.

8 From these facts, the Pollution Control Hearings Board comes to these

9 CONCLUSIONS OF LAW

10 I.

11 Appellant was in violation of respondent's Regulation I as cited in
12 Notices of Violation Nos. 10651 and 11051.

13 II.

14 The amounts levied in Notices of Civil Penalty Nos. 1990 and 2314,
15 although only two-fifths of the maximum allowable amount in each instance,
16 are far from reasonable. What we have here is a popular Seattle waterfront
17 restaurant which is, to use some key words from Section 1.01 of
18 respondent's Regulation I, important to the area's "economic and social
19 development" by providing food cooked in the tradition of the area's
20 natives for the "comfort and convenience" of its patrons while affording
21 them "enjoyment" of the waterfront, one of the area's "natural resources."

22 To the contrary, and again using key words from Section 1.01, it
23 is difficult for this Board to conceive how the emissions observed in this
24 case which are quickly dispersed into the atmosphere 35 feet above street
25 level, could endanger "human health and safety" or be injurious to
26 "plants, animal life or property."

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Trained and experienced inspectors on respondent's staff saw
2 emissions of greater opacity than is permitted by Section 9.03 of
3 Regulation I. Counsel for respondent is correct when he noted, in
4 questioning a witness for appellant, that there is no "severity" clause in
5 Section 9.03. There either is a visual emission violation or there is
6 not; there were violations in both instances here.

7 But Section 3.29 of Regulation I, by implication, does provide a
8 "severity" ratio. The maximum allowable amount is \$250; by inference,
9 the minimum is \$1. Respondent, in levying civil penalties, generally
10 uses this implied "severity" ratio. In these matters, respondent has
11 made a judgment that the violations, on a scale of \$1 to \$250, call for
12 penalties of \$100 each.

13 We strongly disagree. Those penalties, in view of the circumstances
14 which we have recited in a preceding paragraph of this Conclusion, not
15 only are unreasonable, but excessive and unwarranted. On a "severity"
16 scale of \$1 to \$250, each instant violation does not warrant a penalty
17 of more than \$1.

18 III.

19 Any Finding of Fact herein which is deemed to be a Conclusion of
20 Law is adopted herewith as same.

21 Therefore, the Pollution Control Hearings Board issues this
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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

ORDER

The appeals are denied, but Notice of Civil Penalty No. 1990 is reduced from \$100 to \$1 and Notice of Civil Penalty No. 2314 is reduced from \$100 to \$1.

DONE at Lacey, Washington, this 5th day of December, 1975.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Chairman

Walt Woodward
WALT WOODWARD, Member

FINAL FINDINGS OF FACT,
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These matters, the consolidated appeals of two \$100 civil penalties for alleged smoke emission violations of respondent's Regulation I, came before the Pollution Control Hearings Board (Chris Smith, presiding officer, and Walt Woodward) at a formal hearing in the Seattle facility of the State Board of Industrial Insurance Appeals on September 4, 1975.

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18 minutes in any one hour of an air contaminant of greater opacity than
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24 waterfront of Seattle, King County. The restaurant features seafood
25 cooked over alderwood in the tradition of Puget Sound Indians. The
26 restaurant has grown in popularity and now is a tourist attraction.

27 FINDINGS OF FACT,
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1 Emissions from the seafood grill and a hamburger grill are vented to
2 the atmosphere through separate stacks which emerge from the restaurant
3 roof about 35 feet above the level of Alaskan Way, the street which
4 parallels the Elliott Bay waterfront.

5 IV.

6 In November, 1974, respondent, which originally adopted Regulation I
7 in 1968, entered a new phase of enforcement of its visual emission
8 standards (Section 9.03) by applying them to restaurants. Appellant was
9 among the first to be contacted. For the next four months, respondent
10 was not successful in efforts to obtain a smoke emission compliance
11 schedule from appellant.

12 V.

3 On March 20, 1975, an inspector on respondent's staff observed
14 blue-white smoke of 60 percent opacity being emitted for at least six
15 consecutive minutes from appellant's hamburger grill stack. In connection
16 therewith, respondent served on appellant Notice of Violation No. 10651,
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18 Penalty No. 1990 in the sum of \$100.

19 On July 21, 1975, an inspector on respondent's staff observed blue
20 smoke varying in opacity from 25 to 80 percent being emitted from
21 appellant's seafood grill stack for eight minutes during a 40-minute
22 continuous observation period. In connection therewith, respondent served
23 on appellant Notice of Violation No. 11051, citing Section 9.03 of
24 respondent's Regulation I, and Notice of Civil Penalty No. 2314 in the
25 sum of \$100.

6 The civil penalties are the subjects of the appeals.

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

VI.

In both instances, the smoke was minimal in quantity, was dispersed quickly in the atmosphere 35 feet above street level and was not noticeable at street level. In both instances, the smoke was emitted from devices which promoted the economic and social development of the area by fostering the comfort and convenience of inhabitants and by facilitating the enjoyment of the area's natural resources.

VII.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is adopted herewith as same.

From these facts, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Appellant was in violation of respondent's Regulation I as cited in Notices of Violation Nos. 10651 and 11051.

II.

The amounts levied in Notices of Civil Penalty Nos. 1990 and 2314, although only two-fifths of the maximum allowable amount in each instance, are far from reasonable. What we have here is a popular Seattle waterfront restaurant which is, to use some key words from Section 1.01 of respondent's Regulation I, important to the area's "economic and social development" by providing food cooked in the tradition of the area's natives for the "comfort and convenience" of its patrons while affording them "enjoyment" of the waterfront, one of the area's "natural resources."

To the contrary, and again using key words from Section 1.01, it is difficult for this Board to conceive how the minimal emissions, quickly

FINDINGS OF FACT,
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1 dispersed into the atmosphere 35 feet above street level, could endanger
2 "human health and safety" or be injurious to "plants, animal life or
3 property."

4 Trained and experienced inspectors on respondent's staff saw
5 emissions of greater opacity than is permitted by Section 9.03 of
6 Regulation I. Counsel for respondent is correct when he noted, in
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9 not; there were violations in both instances here.

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11 "severity" ratio. The maximum allowable amount is \$250; by inference,
12 the minimum is \$1. Respondent, in levying civil penalties, generally
13 uses this implied "severity" ratio. In these matters, respondent has
14 made a judgment that the violations, on a scale of \$1 to \$250, call for
15 penalties of \$100 each.

16 We strongly disagree. Those penalties, in view of the circumstances
17 which we have recited in a preceding paragraph of this Conclusion, not
18 only are unreasonable, but excessive and unwarranted. On a "severity"
19 scale of \$1 to \$250, each instant violation does not warrant a penalty
20 of more than \$1.

21 III.

22 Any Finding of Fact herein which is deemed to be a Conclusion of
23 Law is adopted herewith as same.

24 Therefore, the Pollution Control Hearings Board issues this

25 ORDER

26 The appeals are denied, but Notice of Civil Penalty No. 1990 is

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 reduced from \$100 to \$1 and Notice of Civil Penalty No. 2314 is reduced
2 from \$100 to \$1.

3 DONE at Lacey, Washington, this 7th day of October, 1975.

4 POLLUTION CONTROL HEARINGS BOARD

5 Chris Smith
6 CHRIS SMITH, Chairman

7 Walt Woodward
8 WALT WOODWARD, Member

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26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER